United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

76-1483

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1483

UNITED STATES OF AMERICA,

Appellee,

—v.—

EDMUND A. ROSNER,

Appellant.

APPELLANT'S APPENDIX

ALAN M. DERSHOWITZ
Attorney for Appellant
41 Concord Avenue
Cambridge, Mass.

Of Counsel:
NANCY ROSNER
J. JEFFREY WEISENFELD
401 Broadway
New York, N. Y. 10013

ELLIOT A. TAIKEFF
335 Broadway
New York, N. Y. 10013

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PROCEEDINGS

Rosner-Filed affidavit of Seymour Rotker Chief ASST D.A. Bronx County.

Rosner- Filed order quashing subpoena's by the deft Rosner to Mario Merola D.A. Bronx County & Seymour Rotker & D.A. Carl Bornatein and is here ordered that the ~~xxxx~~ D.A. Bx. County preserve all affidavits and exhibits submitted to this Court. Bauman,J.

-73 Rosner-Filed motion for leave to file brief amicus curiae and brief amicus curiae of New Civil liberties union in support of deft's motion unde 33

-73 Rosner-Filed govt's memorandum of law.

15-73 Rosner-Filed govt's affidavit in opposition.

15-73 Rosner-Filed deft's memorandum of law.

15-73 Rosner-Filed deft's supplemental memorandum of law.

16-73 Rosner-Filed Govt's memorandum of law.

16-73 Rosner-Filed Govt's supplemental affidavit in opposition.

15-73 Rosner-Filed deft's affidavit.

15-73 Rosner-Filed Govt's memorandum of law.

15-73 Rosner-Filed Govt's affidavit in opposition to deft's motion for a new tria based in newly discovered evidence.

15-73 Rosner- Filed Opinion # 39315 on deft's second motion for a new trial, ***"For all the reasons stated above, Rosner's second motion for a new trial must be, and hereby is DENIED. The deft is ordered to appear for sentence at 9:30A.M. on March 20,1973." SO Ordered (s Bauman,J.

13-73 Filed Govt's affidavit in opposition.

13-73 Rosner-Filed reply affidavit by Paul G. Chevigny atty Civil Liberties Unio

13-73 Filed order that leave is hereby granted for the New York Civil Liberties U ***** to file an amicus curae brief in support of deft Rosner's motion for new trial . Bauman,J.

20-73 EDMUND A.ROSNER(Atty.present)Deft is committed to custody for imprisonment for a perio of FIVE YEARS on each of counts 1,2,6,7 & 8 to run concurrently with each other...Bail continued in sum of $15,000 Personal Recognizance Bond pending appeal. Condition of bail being that appeal is expediously pursued.....Bauman, J... (Entered 3-21-73)

20-73 Rosner- Filed notice of appeal to the USCA for the

PROCEEDINGS

SNER - Filed d fts. brief in support of motion for new trial.

LAMATTINA - Filed true copy of J/C with marshals return; deft. delivered in Air Force Base 3-25-74.

S DeSTEFANO Filed true copy of J/C with marshals return; deft. delivered to Eglin Air Force Base 3-25-74.

MUND A. ROSNER - Filed affdvt and notice of motion granting counsel interview with Robert Leuci.

EDMUND A. ROSNER - See official court reporters minutes for courts determination. BAUMAN,J.

74 Filed one sealed envelope; Ordered sealed and impounded. Placed in Vault Room 602. BAUMAN,J.

3-74 EDMUND A. ROSNER- Filed Deft's Notice of Motion and Affdvt for Discovery and Inspection.

-74 EDMUND A. ROSNER- Filed Deft's Memorandum of Law in Support of his motions for Discovery and Inspection.

18-74 NICHOLAS DeSTEFANO-Filed Deft's Notice of Motion with Supporting Affdvt for reduction of Sentence imposed on 2-20-74.

18-74 NICHOLAS J. LAMATTINA- Filed Deft's Notice of Motion with supporting Affdvt for reduction of Sentence imposed on 2-19-74.

18-74 Filed True Copy of U.S.C.A. order with Mandate attached. The Judgment of the District Court is affirmed. It is further ordered, adjudged and decreed that the sentence of the court below be and it hereby is vacated and that the action be and it hereby is rema remanded to said District Court for resentencing in conformity with the opinion of this court. (Mailed Notice's)

-21-74 EDMUND A ROSNER- Exhibits 1, 2, and 3, ORDERED SEALED & IMPOUNDED THIS DAY--BAUMAN,J.

6-24-74 Filed Order that no deft. or his counsel or investigator shall make any disclosure of any matters contained in material turned over to them involving Robert Leuci except as may be necessary to effectuate the proceeding in this case.....It is furthe ordered that the prohibition against access by others and disclosure to others and disclosure shall remain in effect throughout the proceedings in this case and until such time as the Court removes or modifies these prohibitions and in no event shall any of the defts or their counsel make or have any public disclosures or discussions or conversations concerning any of the matters contained in any of the matters contained in any of the papers to be supplied...Bauman.J. m/w

-3-74 EDMUND A. ROSNER- Exhibits 1, 2, and 3, RE-ORDERED SEALED AND IMPOUNDED THIS DAY, BY ORDER OF BAUMAN,J.

-4-74 EDMUND A. ROSNER- Filed ORDER - The Gov't shall be permitted to furnish to the Special State Prosecutor a retyped copy of Court's Exhibit 1 of May 28, 1974, ordered sealed by the Court. A copy of this order shall be served upon the Special State Prosecutor's office at the time the retyped copy of the above-mentioned exhibit is furnished to said office. IT IS SO ORDERED--BAUMAN, J.(Mailed Notice)

	PROCEEDINGS
	EDMUND A. ROSNER-Filed Gov't post-hearing memorandum of law.
8-16-74	EDMUND A. ROSNER-Filed OPINION #41,093 Motion for a new trial denied--Bauman,J. mailed notices.
8-16-74	EDMUND A. ROSNER-Filed JUDGMENT and COMMITMENT-It is adjudged that the deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS on each of counts 1,2,6,7 and 8, to run concurrently with each other. Deft. continued released on own recognizance pending appeal.....Wyatt,J.
8-22-74	EDMUND A. ROSNER-Filed Notice of Appeal from the judgment of conviction and sentence rendered by Judge Wyatt on 8-16-74. Mailed notice to Edmund Rosner, 401 Broadway, N.Y.C. and U.S. Attorney's Office.
8-26-74	Filed Govt's memorandum of law.
Aug 26-74	Filed affdvt in opposition to defts' motion for post-trial discovery.
Aug 26-74	Filed letter of attys. for deft Rosner to Judge Bauman dated Aug 6-74.
Aug 26-74	Filed letter of attys. for deft. Rosner to Judge Bauman dated Aug 9-74.
Aug 26-74	Filed transcript of proceedings dated July 1-74.
Aug 26-74	Filed transcript of proceedings dated Aug 16-74.
Sep 3-74	EDMUND A. ROSNER-Filed notice of certification and transmittal of the record on appeal.
8-26-74	Filed transcript of record of proceedings, dated: MAY 29-74
8-26-74	Filed transcript of record of proceedings, dated: July 1-74
8-26-74	Filed transcript of record of proceedings, dated: August 16-74.
6-21-75	EDMUND A. ROSNER-Filed notice of certification & transmittal of the supplemental record on appeal to the U.S.C.A.
7-9-76	EDMUND A. ROSNER - Filed True Copy of Supreme Court of the U.S. Mandate. Petition for Writ of Certiorari is denied. (M/N)
7-9-76	EDMUND A ROSNER - Filed True Copy of USCA Mandate with Opinion Attached. Ordered that Order & Judgment of District Court is Affirmed. Judgment Entered Clerk 7/12/76 Entered 7/26/76 (M/N)
8-27-76	EDMUND A. ROSNER - Filed Dfts. Notice of Motion for order allowing dft. to vol. surrender at Fed. institution of Allenwood, Penn.
8-27-76	EDMUND A. ROSNER - Filed Dfts. Notice of Motion for order staying dft. surrender.
8-27-76	EDMUND A. ROSNER - Filed Dfts. Notice of Motion for order vacating & setting aside judgment of conviction.

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	PROCEEDINGS
-27-76	EDMUND A. ROSNER - Filed Dfts. Notice of Motion for order reducing dfts. sentence.
-76	EDMUND A. ROSNER - Filed Dfts. affidavit in support of motion to reduce sentence.
9-3-76	EDMUND A. ROSNER - Fil Memo. End. on motion dtd. 8/27/76 for order allowing dft. to surrender. Motion in open court & by written notice has been withdrawn & is so allowed.....Wyatt J. (mailed notice)
9-3-76	EDMUND A. ROSNER - Filed Dfts. Notice of withdrawal of motion for a new trial.
9-3-76	EDMUND A. ROSNER - Filed Dfts. Notice of withdrawal of motion for dft. to surrender.
9-8-76	EDMUND A. ROSNER - Filed True Copy of USCA Mandate. Motion dtd. 8/27/76 to stay surrender pending disposition of petition for rehearing of the denial of a petition for certiorari & to stay surrender & continue on own recognizance Granted. (mailed notice)
3-76	EDMUND A. ROSNER - Filed Memo. End. on motion dtd. 8/27/76. Motion denied except to the extent as indicated.....Wyatt J. (mn)
3-76	EDMUND A. ROSNER - Filed Memo. End. on motion dtd. 8/27/76. Motion denied as indicated.....Wyatt J. (mn)
9-3-76	EDMUND A. ROSNER - Filed Memo. End. on motion dtd. 8-27-76. Motion Withdrawn in open Court & by written notice is allowed.....Wyatt J. (mn)
9-27-76	EDMUND A. ROSNER - Filed Dfts. Notice of Motion & supporting affdvt. for order vacating, setting aside or correcting sentence imposed on 8-16-76 & reassigning case for resentencing to another judge. Ret. 10-1-76.
0-1-76	EDMUND A. ROSNER - Filed Dft.s Reply Affidavit.
30-76	EDMUND A. ROSNER - Filed Gov'ts Affdvt. in opposition to dfts. motion to vacate sentence.
-76	EDMUND A. ROSNER - Filed Memo. End. on dfts motion dtd. 9-27-76. Motion Denied. Wys (mn)
76	ROSNER - Filed defendant's notice of appeal from order entered on ~~this~~ October 1-76, denying the motion of deft. to vacate, set aside or correct the illegal sentence imposed upon him by Judge Wyatt on August 16-74, pursuant to FRCrP 35

Clerk of the Court

PROCEEDINGS

and 28 U.S.C. sect. 2255 and to reassign the case for resentence before another judge together with such other relief as may be just in the circumstances. n/m.

Filed stipulation and order pursuant to rule 11(f) of FRAP, for a partial record on appeal in this matter.

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk

BY _____
Deputy Clerk

FILED
SEP 29 1976

_____
Clerk of the Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

UNITED STATES OF AMERICA

-against-

NOTICE OF MOTION

EDMUND A. ROSNER,

72 Cr. 782

Defendant

- -X

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Alan M. Dershowitz duly sworn to the 24th day of September, 1976, and all of the papers and proceedings heretofore had herein, a motion will be made before this Court, the Hon. Inzer B. Wyatt presiding, in Courtroom 905 of the federal cou house located at Foley Square, New York, on the 1st day of October, 1976, at 2:30 p.m. or as soon thereafter as counsel can be heard for an order pursuant to F.R.Cr.P. 35, and 28 U.S.C. §2255 vacating, setting aside or correcting the illegal sentence imposed upon the defendant by the Hon. Inzer B. Wyatt on August 16, 1974 and reassigning this case for resentencing before another judge together with

such other and further relief as may be just and proper in the circumstances.

Yours, etc.,

ALAN M. DERSHOWITZ
Attorney for Defendant
41 Concord Avenue
Cambridge, Mass., 02138

Dated: New York, New York
September 24, 1976

TO: Robert B. Fiske, Jr.
United States Attorney
Southern District of New York
1 St. Andrews Plaza
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

UNITED STATES OF AMERICA

-against-

AFFIDAVIT

EDMUND A. ROSNER,

75 Cr. 782

Defendant

- -X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ALAN M. DERSHOWITZ, being duly sworn, deposes and says:

I am the attorney for the above-named defendant and I make this affidavit in support of a motion to vacate, set aside or correct the illegal sentence imposed upon the defendant by the Hon. Inzer B. Wyatt on August 16, 1974, and to reassign the case for resentencing to another judge together with such other and further relief as may be just and proper in the circumstances.

This case was tried before the Hon. Arnold Bauman and a jury commencing November 20, 1972. On December 5, 1972, the defendant was convicted of the crimes of conspiracy, 18 U.S.C. §371, obstruction of justice, 18 U.S.C.§§1503, and 2, and of

three counts of bribery, 18 U.S.C. §§201(b) and 2, and 3237. He was sentenced by the Hon. Arnold Bauman on March 20, 1973, to a five year term of imprisonment. Thereafter, the Court of Appeals affirmed the conviction but remanded for resentencing before another judge. On August 16, 1974, the Hon. Inzer B. Wyatt sentenced the defendant to a term of imprisonment of three years. On September 3, 1976, he denied a motion addressed to his discretion, to reduce the sentence.

The Court of Appeals remanded for resentencing because the procedure followed on defendant's initial sentencing was illegal. Judge Bauman in sentencing the defendant considered a memorandum which was prepared by the United States Attorney's Office which the Probation Department did not screen or verify and which contained accusations of alleged "possible misrepresentations, fraudulent conduct, lying and unethical behavior" on the part of the defendant. The memorandum contained an accumulation of hearsay, inferences and adverse conclusions of Assistant United States Attorneys. It was conveyed to the court ex parte and was retained by it in camera for two months before the sentence; it was shown to defense counsel only on the morning of the sentencing and counsel's timely request for a continuance to contradict the report which the defendant claims was false and misleading, was denied. It was the combination of these factors which led the

Court of Appeals to conclude that the defendant's initial sentencing was illegal, requiring a remand for resentencing.

See United States v. Rosner, 485 F.2d 1213, 1229-31 (2d Cir. 1973).

Upon remand, however, Judge Wyatt, compounded the original error by specifically giving weight to Judge Bauman's previous illegal sentence as a factor to be considered in formulating the defendant's sentence.

Before imposing sentence Judge Wyatt stated:

> " I have taken into account, as a factor, Judge Bauman's sentence and I disagree with Mr. Dershowitz's memorandum that no weight whatever can be given to Judge Bauman's sentence.
> I believe that Judge Bauman's sentence is one of the many factors to be considered, properly to be considered by me in arriving independently at a sentence now to be imposed.
> I consider Judge Bauman one of the ablest judges to have graced this Court and I have for him the highest respect...."
> (Transcript of sentencing proceeding, before Hon. Inzer B. Wyatt, August 16, 1974, pp.14-15, a copy of which is annexed hereto).

A judge in exercising his sentencing discretion may not rely,even in part, upon misinformation, such as an inaccurate criminal record, Townsend v. Burke, 334 U.S. 736 (1948); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970). See also United States v. Rosner, supra; nor be influenced,even to some extent,by an illegal conviction, United States v. Tucker, 404 U.S. 443 (1972); McGee v. United States, 462 F.2d 243 (2d Cir. 1972); United States v. Rivera, 521 F.2d 125,129 (2d Cir. 1975). In this case, Judge

Wyatt expressly acknowledged that one of the factors which contributed to the formulation of the three year sentence he was imposing upon th defendant was Judge Bauman's prior illegal sentence, which was invalidated because it was influenced by the prosecutor's adversary memorandum which contained alleged misinformation which the defendant was denied an opportunity to contradict. The sentence imposed by Judge Wyatt thus, is admittedly the fruit of the poisonous tree and consequently must be set aside and the defendant resentenced. The resentencing should be done by another judge.

The Court of Appeals said in vacating the sentence imposed by Judge Bauman:

> "The resentencing should be done by another judge. On the facts of this case we adopt the rationale of the First Circuit, [i]t is difficult for a judge, having once made up his mind, to resentence a defendant, and both for the judge's sake, and the appearance of justice, we remand this case to be redrawn." See Mawson v. United States, 463 F.2d 29 (1st Cir. 1972).

United States v. Rosner, supra at 1231. This rationale applies equally in this situation.

WHEREFORE it is respectfully requested that this motion to vacate, set aside or correct the illegal sentence imposed upon the defendant by the Hon. Inzer B. Wyatt on August 16, 1974, be granted and that the case be reassigned to another judge for

resentencing together with such other and further relief as may be just and proper in the circumstances.

ALAN M. DERSHOWITZ

Sworn to before me this
24th day of September, 1976

rds:mg

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

v. : 72 Cr. 782

EDMUND A. ROSNER, :

Defendant. :

- - - - - - - - - - - - - - - - - x

Before:

HON. INZER B. WYATT,
District Judge

New York, New York
August 16, 1974

APPEARANCES:

ELLIOT G. SAGOR, Esq.,
For the Government

ALAN DERSHOWITZ, Esq.,
For the Defendant

THE CLERK: United States of America v. Edmund A. Rosner.

MR. SAGOR: Ready for the government.

MR. DERSHOWITZ: Ready for the defendant.

THE COURT: Now, before I hear counsel, I think I ought to indicate what I have considered up to this point.

I have considered the minutes of the sentencing proceedings before Judge Bauman; I have considered the opinion of the Court of Appeals; I have considered the pre-sentence report of the Probation Office, and the matters annexed to it; and a supplementary report dated June 28, 1974, from the Probation Office.

Mr. Dershowitz, I assume that you have seen this Probation Office pre-sentence report?

MR. DERSHOWITZ: Your Honor, this afternoon we saw a one and a half page addendum to the last probation report.

I assume that is what you are referring to?

THE COURT: That is right. And the Probation Report itself, I assume you had a chance to see it?

MR. DERSHOWITZ: Yes, we have.

THE COURT: Now, I have also considered the sentencing memorandum of the government which shows it

was filed November 27, 1973, the defendant's sentencing memorandum filed August 15, 1974.

I have read in part, but not very carefully the opinion filed yesterday by Judge Bauman on the motion for a new trial, and I guess-- I think that is everything.

Is there anything else that I should have read?

MR. SAGOR: No, your Honor.

MR. DERSHOWITZ: Not that we can think of, your Honor.

THE COURT: And I suppose that in view of the opinion of the Court of Appeals, at least by this time the defendant has had sufficient time to study the government's sentencing memorandum and that the defendant's sentencing memorandum is in response, but I am anxious to follow as correct a procedure as possible.

Is there anything else the defendant would like to submit other than the sentencing memorandum? And, of course, I will hear you.

MR. DERSHOWITZ: No, your Honor, the sentencing memorandum comes in two parts; one is response, and the other is affirmative. That is all we wanted to submit on paper.

THE COURT: Does the government have anything to say at this time?

MR. SAGOR: Yes, your Honor.

THE COURT: All right.

MR. SAGOR: Your Honor, in view of your comments of having, of course, carefully followed the Court of Appeals' opinion and particularly the sentencing minutes before Judge Bauman, the seriousness of the corruption of this case and the extent of that corruption is clearly before the Court.

In addition, the government has submitted months ago a sentencing memorandum which I'm sure this Court has carefully looked at.

In view of that, my comments are going to be brief.

Your Honor, in an effort to undercut the seriousness of these offenses, Mr Dershowitz has submitted to this Court an elaborate box score, so-called, of the various punishments meted out in courts in this country in bribery cases.

As your Honor well knows, the range of punishments in bribery cases in this District can far exceed the recommended co-called ceiling that he gives to this Court.

Your Honor, more importantly, this case does not involve a bribery of an IRS official by some taxpayer.

This is a case of attempts by the defendant to pay $2,000 in cash to a member of this United States Attorney's Office.

Mr. Dershowitz also suggests to this Court very clearly that your Honor should disregard some of the evidence in the case. You should only look, as with blinders on, your Honor, at the evidence submitted solely in behalf of the exact crimes in the indictment. But, your Honor, this misses the point because the other crimes in this indictment refer to obstruction of justice which related not only to the grand jury testimony, not only to 3500 material in Mr. Rosner's then-pending subornation of perjury case, but it also related to two other matters which were on the tape recordings, which, as your Honor has seen over and over again, Judge Bauman described in his opinion as conclusive evidence of the predisposition of Mr. Rosner to engage in obtaining corrupt information.

That related to the Marcone situation, which the Court of Appeals has spelled out, which related to the fact that Mr. Rosner participated in conversations involving secret grand jury investigation of Dominick Marcone, which involved a fix of a narcotics case in Queens County.

Your Honor also knows that this case involved the receipt of information by Mr. Rosner and his participation

in discussions involving the whereabouts and status of George Stewart, an informant in a narcotics case whose very life and safety depended upon the secretiveness of that information.

So we are not talking about, as Mr. Dershowitz would have this Court believe, a lawyer who was merely trying to save his hide. It goes much beyond that, much beyond that, and the tape recordings in this case conclusively show that.

Also the tape recording showed something not in the indictment in this case, something involving Ishmael Quinones, showing Mr. Rosner participating in a conversation involving a fix of another narcotics case. Not that he was the fixer in the case. The government does not allege that. It is a state case but it alleges that he participated in those conversations, and Judge Bauman indicated in the sentencing minutes, I think, your Honor, that Mr. Rosner participated in these discussions as if the subject being discussed was the price of hamburger.

As Judge Bauman has said in the sentencing, previous sentencing, in this case, and the government takes no position on any amount of incarceration in this case, this matter, of course, is clearly before the Court.

But any sentence in this case, the government

respectfully urges, should consider the aspects of deterrence. Any sentence in this case should be a clear warning to those that corruption of this sort will not be tolerated.

THE COURT: All right. Thank you.

Mr. Dershowitz.

MR. DERSHOWITZ: This Court commented in the previous case that it was bound by the verdict of the jury of the case, that it would not reconsider matters of guilt or innocence.

I think that is a two-edged sword, in fact. This Court is bound by what the jury found and is bound by what the jury did not find or may not have found, particularly with all due respect, in a case when your Honor did not preside at the trial and did not hear the evidence.

There is no dispute that this jury could properly have convicted Edmund Rosner on a finding of no more than that Edmund Rosner paid money in order to receive information about himself, about a then-pending indictment against himself.

The government does not dispute that nor can it. That is all the jury had to find under the instructions, and that's all, with due respect, this Court should take

into consideration.

There was evidence, to be sure. It was vigorously-disputed evidence.

This Court has no real basis on which to conclude as a matter of fact whether it believes or whether the jury believed this evidence which the defendant so vigorously disputed.

So I think this Court should consider only the charge against Mr. Rosner that the jury necessarily convicted him on.

And because Your Honor did not preside at the trial, I just want to take one or two minutes to give a brief account of what the evidence was that is not in dispute.

Mr. Rosner was indicted in 1970 on a subornation of perjury charge, a charge which the government ultimately dropped against him.

THE COURT: That's Hernandez.

MR. DERSHOWITZ: Yes.

THE COURT: That is the charge that Judge Metzner finally dismissed and the government did not get a writ of mandamus. I don't think the government dropped it.

MR. DERSHOWITZ: The government did not drop it, the Court dismissed it and lost on its appeal.

The government was forced to drop it, you might say.

MR. DERSHOWITZ: While that case was pending and before it was dropped and dismissed by the government, the episode occurred. There is no dispute that Rosner did seek out Leuci. This man, Robert Leuci, came over to Lamattina and DeStefano and said, "Look, do you want the information? We can get it for you." Then the name Rosner came up. And DeStefano raised it first and Leuci raised it and there is no question, no dispute that pressure was put on Mr. Rosner to try to be involved in the plot because he was allegedly the moneyman, the man who could help finance the operation.

There was much dispute as to whether the government put the pressure on Rosner or whether DeStefano and Lamattina put the pressure on Rosner.

The Court and the jury found it was not the government. We are not relitigating that. There is no dispute there was pressure on Rosner.

There is also no dispute that he first turned it down. His first response was no, I won't do it. Then he agreed.

Now, there was evidence in the case, Mrs. Rosner, testified, his wife Nancy Rosner, a distinguished lawyer before this court, testified that Edmund Rosner was under

enormous pressure. He was confused, he did not know what to do. He was faced with this charge of which he believed himself to be innocent. He was told here was an opportunity to find out what they had on him. He was desperate. He made a terrible mistake. He committed a serious crime. He did not pay money for himself. This was not a crime of venality. This was not a crime like the crime in which a U. S. Attorney accepts a bribe to make money or in which a judge accepts a bribe to make money or in which an IRS citizen pays a bribe in order to save himself some money.

This was an attempt by a desperate and confused lawyer to try to save his career in a misguided fashion. It is a mistake Mr. Rosner has regretted since it occurred. It is a mistake which has ruined him.

Your Honor, it has ruined him as a man, as a lawyer. He is a man who everybody told me whose whole life was the law. His prized possession was his law library and law firm.

He cannot any longer practice. He has been disbarred, financially ruined, he's been psychologically wrecked.

THE COURT: You mean Mr. Rosner has already been disbarred?

MR. DERSHOWITZ: Yes.

THE COURT: That because of a felony conviction is automatic disbarment?

MR. DERSHOWITZ: Yes.

THE COURT: I had assumed that that was the case and that Mr. Rosner would be disbarred, but you tell me that that has already come to pass?

MR. DERSHOWITZ: I can represent to the Court that his sentence will have no effect. Even if this Court would suspend sentence or give a very light sentence, that would have no impact. He is disbarred. He has not practiced law and has been deprived of that professional status and occupation for some time now.

One final point about the extent of sentence. We did cite some statistics. With all due respect, this is your Honor's determination and you are not bound by them. They did not involve cases where a mere citizen pays an agent of the IRS. It involved cases with lawyers, judges, Assistant United States Attorneys were involved in corresponding crimes of bribery, and I think we did marshal data indicating that two years is the maximum usual sentence when a corresponding offense is committed, when a judge takes a bribe, when an Assistant U. S.Attorney accepts a bribe, when an Assistant District

Attorney accepts a bribe.

THE COURT: What was the sentence on Judge Koerner?

MR. DERSHOWITZ: There are a number of matters on that case. Why we did not cite it - and it wasn't because of the sentence, he was not indicted for activities while he was a judge--

THE COURT: I know the case. While he was governor. I was just wondering if you happen to remember it.

MR. DERSHOWITZ: I don't remember what it was. I'd be happy to provide your Honor that information.

My recollection is it was less than five years, is my recollection, but not my respresentation.

THE COURT: Of course.

MR. DERSHOWITZ: The two other defendants in this case, each who were clearly more involved and in terms of inviting and initiating, each received one year, which I think is probably a more relevant consideration, too.

The final point--

THE COURT: Yes, because I think Mr. Rosner is held to a high standard.

MR. DERSHOWITZ: The other point which is important has been in the case from the beginning and what

Mr. Sagor emphasized is that this case involved this United States Attorney's Office.

I think that explains the commendable zeal with which this United States Attorney's Office, which has felt itself to be the alleged victim of this crime, has prosecuted this case.

I don't think it is a relevant consideration for this Court for this reason. Mr. Rosner did not select this United States Attorney's Office. It was this United States Attorney's Office which selected itself as the object of the alleged bribe; that is, it sent somebody out saying we had a contact not in the Eastern District, the Southern District, and if you want to find out about yourself, you have to pay our contact.

It wasn't as if Mr. Rosner selected this district to infiltrate. This, it seems to me, is an irrelevancy and red herring that has been plaguing this case from the very beginning.

Just finally, it seems to me that when one looks at the sentences that have been imposed in similar cases; I don't want to downplay the importance of the seriousness of this crime, your Honor is right in indicating this crime involves a member of the bar who is to be held to a higher standard, but it involves a member of the bar

and not an Assistant U. S. Attorney, and not a judge. And if we are to have a hierarchy, the lawyer fits somewhere in the middle. He fits above DeStefano and Lamattina but he does not fit above other people in the hierarchy of justice, whom two years was felt was adequate and sufficient sentence.

THE COURT: Mr. Rosner, is there any information you would like to give me on your own behalf, any information in mitigation of punishment?

DEFENDANT ROSNER: I can't speak now, your Honor.

THE COURT: Well, I think I ought to say I have not taken into account in now formulating a sentence the so-called Joe Jacobs incident or the four so-called unrelated matters; that is, I think the defendant's sentencing memorandum calls them unrelated matters. I have not passed on them one way or the other. I simply have not taken them into account.

I have taken into account, as a factor, Judge Bauman's sentence and I disagree with Mr. Dershowitz' memorandum that no weight whatever can be given to Judge Bauman's sentence.

I believe that Judge Bauman's sentence is one of the many factors to be considered, properly to be

considered by me in arriving independently at a sentence now to be imposed.

I consider Judge Bauman one of the ablest judges to have graced this court and I have for him the highest respect, but I have reached independently -- now that I have heard finally the submissions this afternoon, I have reached independently a conclusion as to sentence.

I find, as might have been expected, that I agree with Judge Bauman as to the seriousness of the offenses and that imprisonment is required.

Taking into account that Mr. Rosner, the defendant, has lost, and if the conviction becomes or is final, will irrevocably lose his license to practice law, and taking all the other factors to which Mr. Dershowitz has directed my attention in the memorandum and this afternoon, I do disagree with Judge Bauman as to the length of imprisonment which should be required.

And as long as there are differences between human beings, there are going to be sentencing differences between judges.

On Counts 1, 2, 6, 7 and 8, the defendant is committed to the custody of the Attorney General or his authorized representative, for three years. The sentence is to run concurrently.

Now, Mr. Rosner, you have a right to appeal, and if you are unable to pay the cost of an appeal, you have the right to apply for leave to appeal in forma pauperis, meaning that no prepayment of fees or expenses is required.

If you so request, the Clerk of the Court will prepare and file forthwith a notice of appeal on your behalf.

Now, I take it that an appeal from this judgment of conviction, which includes the sentence, and from the order of Judge Bauman, I take it that an appeal is permissible.

MR. DERSHOWITZ: An appeal is permissible and will be filed immediately.

We have been told by the government that they would not oppose continuation of Mr. Rosner on bail and would not request remand pending completion of the appellate process, which we can represent to the Court we will expedite as expeditiously as is possible.

We would also like to ask the Court, if it would be possible, to make the sentence that the Court has imposed an A-2 sentence, which would make Mr. Rosner eligible for parole.

THE COURT: That means that he would be eligible

for parole at such time as the Parole Board determines?

MR. DERSHOWITZ: I believe so, your Honor.

THE COURT: It does not strike me that that a very realistic request. After all, I assume that he will be eligible for parole in one year and it would seem to me very doubtful that the Parole Board could get the matter before the end of a year in any event.

I don't think I want to grant that request, Mr. Dershowitz. I think I will let the sentence stand as it is.

Mr. Sagor, is that the government's position, that there is no objection to Mr. Rosner remaining in the same bail status?

MR. SAGOR: Yes, your Honor; with the representation that the appeal be prosecuted expeditiously, there is no objection to the defendant being continued.

THE COURT: I have your representation to that effect?

MR. DERSHOWITZ: Yes.

THE COURT: And Mr. Rosner is released on his own recognizance, is that the idea?

MR. SAGOR: Yes.

THE COURT: Mr. Rosner, I will release you on your promise to come to court when required. Do you give

me that promise?

DEFENDANT ROSNER: Yes, your Honor.

...

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -x

UNITED STATES OF AMERICA, :

- v - : AFFIDAVIT

EDMUND ROSNER, : 72 Cr. 782 (IBW)

Defendant. :

- - - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

JEFFREY I. GLEKEL, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and as such am responsible for the above-captioned matter. This affidavit is submitted in opposition to Rosner's motion to vacate the sentence imposed upon him by the Honorable Inzer B. Wyatt on August 16, 1974.

2. Rosner was tried before the Honorable Arnold Bauman and a jury commencing November 20, 1972. The defendant was convicted on December 5, 1972 and after two separate hearings pursuant to two post-trial motions for a new trial, sentence was imposed on March 20, 1973. On September 26, 1973 the Court of Appeals affirmed the conviction, 485 F.2d 1213, but remanded for resentencing.

3. On March 19, 1974 Rosner moved in the District Court for a new trial. On June 10, 1974, the Supreme Court denied Rosner's then pending petition for certiorari, 417 U.S. 950. The Supreme Court's denial of certiorari was without prejudice to the District Court's consideration of

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Rosner's motion for a new trial. Judge Bauman held hearings in July 1974, and on August 15, 1974 denied the motion in an unreported opinion. On August 16, 1974 Judge Wyatt, to whom the resentencing had been assigned, imposed concurrent sentences of three years on each count. The denial of Rosner's new trial motion was affirmed by the Court of Appeals on April 29, 1975, 516 F.2d 269. On June 30, 1976, the Supreme Court denied Rosner's petition for certiorari, 44 U.S.L.W. 3756.

4. On September 3, 1976, Judge Wyatt denied a motion by Rosner to reduce his sentence. Judge Wyatt stated in his order that he had "grave doubt that there is any jurisdiction to grant this motion because of a lapse of time...."

5. To the extent that Rosner brings the instant motion under Rule 35 of the Federal Rules of Criminal Procedure, it is untimely and should not be considered. To the extent that Rosner predicates the motion on Section 2255, Title 18, United States Code, this Court should not consider it because Rosner has failed to raise the issue by way of appeal from Judge Wyatt's sentence.

6. Although Rosner purports to cast this motion as one to correct an illegal sentence, which is never untimely under Rule 35, he points to no defect rendering the sentence invalid on its face and his motion clearly is only one to "correct a sentence imposed in an illegal manner," which may only be done

> "within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days

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> after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction." Rule 35.

Over two years, of course, have elapsed since Judge Wyatt's imposition of sentence. Although the Supreme Court denied certiorari in June of this year on Rosner's new trial motion, this did not involve an appeal from the judgment of conviction, which was affirmed by the Court of Appeals in September 1973 and on which certiorari was denied in June 1974. Thus this Court has no jurisdiction to grant the motion.

7. This Court should also decline to consider this motion under §2255. The only conclusion that can be drawn from the record is that there has been "a deliberate bypassing of the orderly federal procedures provided" by statute. Williams v. United States, 463 F.2d 1183, 1184 (2d Cir.), cert. denied, 409 U.S. 967 (1972); see Kaufman v. United States, 394 U.S. 219, 227 n. 8 (1969); United States v. West, 494 F.2d 1314 (2d Cir. 1974). Although Rosner was represented by his present counsel at the sentencing and was fully informed of his right to appeal, sentencing minutes at page 16, he has never appealed Judge Wyatt's sentence on the grounds that Judge Wyatt improperly considered Judge Bauman's earlier sentence as a relevant factor in imposing sentence. Rosner has thus deliberately waived a known right and should not be permitted to relitigate the issue. This is a paradigm case for applying the doctrine of "deliberate bypass." See cases cited, supra. This Court may also take judicial notice of the fact that Rosner has been involved in a course of litigation which has had no purpose other than delay and in which issues are only decided to be raised once again by Rosner. His decision not to file a timely appeal from Judge Wyatt's sentence, but rather to hold the matter

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in reserve until a time of his choosing, is part of this strategy and should not be tolerated. It constitutes a deliberate bypass of the orderly federal procedures for appealing adverse rulings.

8. Rosner's motion is also frivolous on the merits. It is clear from the sentencing minutes that Judge Wyatt complied completely with the terms of the Court of Appeals remand. Rosner was given a full opportunity to respond to and contest the Government's sentencing memoranda. Sentencing minutes at page 3. Indeed, the Court stated that in formulating a sentence, it had "not taken into account the so-called Joe Jacobs incident or the four so-called unrelated matters; that is, I think the defendant's sentencing memorandum calls them unrelated matters. I have not passed upon them one way or the other. I simply have not taken them into account." Sentencing minutes at page 14. When viewed within the context of the entire sentencing procedure, Rosner's claim that the Court's reference to Judge Bauman's sentence constituted reliance upon the fruit of the poisonous tree is meritless. The Court stated that its conclusion as to sentence was arrived at independently:

> "I consider Judge Bauman one of the ablest judges to have graced this court and I have for him the highest respect, but I have reached independently -- now that I have heard finally the submissions this afternoon, I have reached independently a conclusion as to sentence.
>
> I find, as might have been expected, that I agree with Judge Bauman as to the seriousness of the offenses and that imprisonment is required.
>
> Taking into account that Mr. Rosner, the defendant, has lost, and if the conviction becomes or is final, will irrevocably lose his license to practice law,

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> and taking all the other factors to which Mr. Dershowitz has directed my attention in the memorandum and this afternoon, I do disagree with Judge Bauman as to the length of imprisonment which should be required.
>
> And as long as there are differences between human beings, there are going to be sentencing differences between judges." Sentencing minutes at page 15.

In fact, on the basis, at least in part, of Rosner's submissions, Judge Wyatt reduced Judge Bauman's sentence from five years to three years. Moreover, it is clear that while the Court shared Judge Bauman's view of the seriousness of the offense, it did not consider Judge Bauman's sentence to the extent that it was predicated upon Government submissions which the defendant did not have sufficient notice to contest at the original sentence. As set forth, supra, the Court explicity stated that it was not considering matters which Rosner claimed to be unrelated. The Court obviously discounted Judge Bauman's sentence to the extent that it may have been based on those matters. To have done otherwise would have been inconsistent. Thus the Court's sentence was not predicated in the least upon misinformation. Cf. Counts v. United States, 527 F.2d 542, 544 (2d Cir. 1975); United States v. Herndon, 525 F.2d 208, 210 (2d Cir. 1975); United States v. Hermann, 524 F.2d 1103 (2d Cir. 1975); Schwartzberg v. United States, 382 F.2d 1012 (2d Cir. 1967), cert. denied, 391 U.S. 928 (1968).

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WHEREFORE, it is respectfully submitted that upon this affidavit, Rosner's motion to dismiss the indictment should be denied.

JEFFREY I. GLEKEL
Assistant United States Attorney

Sworn to before me this
30th day of September, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -X

UNITED STATES OF AMERICA

-against-

EDMUND A. ROSNER,

Defendant

AFFIDAVIT

72 Cr. 782
(IBW)

- -X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ELLIOT A. TAIKEFF, being duly sworn, deposes and says:

I am of counsel to Alan M. Dershowitz, the attorney for the above named defendant and I submit this affidavit in reply to the affidavit of Jeffrey I. Glekel submitted in opposition to the defendant's motion to vacate the sentence imposed upon him by the Hon. Inzer B. Wyatt on August 16, 1974.

Several points in Mr. Glekel's affidavit require response.

This motion is timely and well founded under either F.R.Cr.P. 35 or 18 U.S.C. §2255. This is a motion to vacate an illegal sentence, whose illegality is demonstrated on the record by the sentencing court's acknowledgement that Judge Bauman's

illegal sentence was a factor which influenced him in formulating the defendant's sentence. Consequently, under the terms of both Rule 35 and §2255, this motion may be made at any time.

This is not a motion made to correct a sentence imposed in an illegal manner, where for example, a sentencing court fails to afford a defendant an opportunity to make a statement in his own behalf as required by Rule 32(a). Thus, the 120 day time limit contained in Rule 35 does not apply. However, even if it did, this motion would still be timely since it was filed "within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment..., or within 120 days after entry of an order or judgment of the Supreme Court denying review of, or having the affect of upholding, a judgment of conviction". Rule 35. This court recognized at the defendant's sentencing on August 16, 1974, "that an appeal from this judgment of conviction, which includes the sentence, and from the order of Judge Bauman,....is permissible". (sentencing minutes, p.16). The defendant appealed unsuccessfully to the Court of Appeals whose affirmance upheld the judgment of conviction. That court, on August 16, 1975, stayed the issuance of its mandate pending the disposition of defendant's application to the Supreme Court for a Writ of Certiorari. On June 30, 1976 the Supreme Court denied the petition for certiorari which had the effect of upholding the judgment of conviction. In July, 1976, after receiving notice of the denial of certiorari, the Court of Appeals issued its mandate. The defendant has filed

this motion within 120 days of the receipt by this court of the mandate of the Court of Appeals, as well as within 120 days of the Supreme Court's denial of his petition for certiorari. Therefore, even if this court treats the defendant's motion as one made to correct a sentence imposed in an illegal manner, it would still be timely.

The government's argument that this motion may not in addition be brought under §2255, because, the defendant's failure to assert his claims on appeal constitute a "deliberate bypass" of orderly federal procedures provided by statute, appears inconsistent with the argument it advances in opposition to the motion being made under Rule 35. Nevertheless, the cases it cites in support of this argument are inapposite. They deal exclusively with deliberate failure to raise Fourth Amendment issues either at trial or on appeal. It is well settled that the failure to make a timely motion to suppress under Rule 12, or the deliberate abandonment of a Fourth Amendment claim on appeal constitute a waiver of the point. Such is not the case with an illegal sentence as the terms of Rule 35 and §2255 make plain, because different values and interests are at stake.

Defendant's motion is also well founded on the merits. It is clear that although Judge Wyatt attempted to comply with the Court of Appeals'mandate and in arriving at his sentence he relied upon factors which he legitimately could consider, it is

also clear that he made the sentence illegal by specifically taking "into account, as a factor, Judge Bauman's sentence" (sentencing minutes, p.14) in formulating the sentence which he imposed. To argue the contrary is to disregard the record and blink reality.

The government's argument that Judge Wyatt "did not consider Judge Bauman's sentence to the extent that it was predicated upon government submissions which the defendant did not have sufficient notice to contest at the original sentence". And that the "court obviously discounted Judge Bauman's sentence to the extent that it may have been based on those matters" is speculation. Neither the government nor Judge Wyatt can possibly know to what extent Judge Bauman's sentence was based on those matters and neither can it in turn be determined to what extent these same factors unwittingly influenced Judge Wyatt's sentence.

The cases the government relies upon in support of this point are all situations in which the sentencing court disavowed any reliance upon alleged misinformation or other improper considerations. The record in this case explicitly establishes just the opposite.

WHEREFORE, it is respectfully requested that the defendant's motion to vacate, set aside or correct the illegal sentence imposed on him by the Hon. Inzer B. Wyatt on August 16, 1974,

be granted and that the case be reassigned to another judge for resentencing together with such other and further relief as may be just and proper in the circumstances.

ELLIOT A. WAIKER

Sworn to before me this

1st day of October, 1976.

jg

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA :

vs. :

EDMUND A. ROSNER, : 76 Cr. 782 (IBW)

Defendant :

- - - - - - - - - - - - - - - - - - - x

Before:

Hon. Inzer B. Wyatt,

District Judge

New York, N. Y.

October 1, 1976 - 4.05 P.M.

APPEARANCES:

Robert B. Fiske, Jr., Esq.,
United States Attorney
For the Government
By: Jeffrey Glekel, Esq.,
Assistant United States Attorney

Alan M. Dershowitz, Esq.,
Attorney for Defendant
By: Elliot Taikeff, Esq., of Counsel

THE COURT: Mr. Taikeff, are you appearing here for Mr. Rosner?

MR. TAIKEFF: Yes. I'm of counsel to Mr. Dershowitz, your Honor.

THE COURT: Yes. All right.

MR. TAIKEFF: As your Honor knows, this is a motion to vacate the sentence which was imposed by your Honor. The Government --

THE COURT: Yes, and I have no sympathy for it whatever. I've already expressed myself when Mr. Dershowitz was down here asking me to delay Mr. Rosner's surrender in order to permit a ruling on a petition for rehearing in the Supreme Court, and I told him that I felt this matter was a disgrace to the administration of justice because of the length of time that it has taken, and three of the learned judges upstairs disagreed with me.

But I did stay the surrender to permit an application to the Court of Appeals and they agreed with the movant and did stay his surrender, as I understand it. And now the game is continuing.

MR. TAIKEFF: Your Honor, this doesn't extend any time limits that have been previously set by any court or otherwise.

THE COURT: No. But it is just part of the

same game. It is just a ploy.

MR. TAIKEFF: It isn't a ploy, your Honor. First of all, I think that your Honor would surely expect every defendant and his counsel to take advantage of everything that the law entitles the defendant to, and this is one of the things which the defendant is entitled to, it is our position.

It does not in any way extend the time within which he would be free should he eventually not prevail in the Supreme Court. So that it is not a delaying tactic. It is a motion which Rule 35 permits him to make within 120 days of a ruling by the Supreme Court of the United States, which ruling was made on June 30, 1976, and we are still within the 120 days.

The Government seems to take the position that we are not. I'm not sure that I understand Mr. Glekel's response in that regard, but it seems clear that until October 24, 25 or 26 we are within the 120 days and your Honor has jurisdiction to hear this matter. And if, as we allege, the sentence is illegal, then your Honor could hear that motion at any time, not just within 120 days.

THE COURT: How could the sentence be illegal?

MR. TAIKEFF: Because your Honor stated at the sentencing that your Honor was considering as one of the

factors the sentence which had been previously imposed.

THE COURT: Yes. All right. The motion is without merit and is denied.

Mr. Taikeff, I understand your point fully, but it just affronts common sense, in my opinion. That's why I say it is without merit.

MR. TAIKEFF: Your Honor, the cases have been very clear that the appellate courts are very sensitive that judges who are imposing sentence not take into consideration anything that might improperly influence the independent decision of that judge based on information which has come from reliable or a neutral source, such as the Department of Probation.

In this particular case the Second Circuit vacated the sentence because they felt that Judge Bauman's sentence may have been arrived at in an improper fashion and your Honor said that he was giving weight to that sentence because of the respect, the professional respect, which your Honor had for Judge Bauman, and that in the opinion of counsel --

THE COURT: Not only that, but he tried the case.

MR. TAIKEFF: But, your Honor, his sentence was sufficiently tainted so that the Second Circuit required

not only that the defendant be resentenced but before another judge so that there would be no question about that taint.

It was the sentence which was tainted. Your Honor, in an effort to do the right thing -- I read the sentencing minutes carefully and it is clear that your Honor was cautious to make sure that your Honor read all all the papers, that the defendant had an opportunity to respond -- asked counsel for both sides very carefully, and said on the record, "I want to make sure tha- I'm doing this the right way."

Regrettably, in our opinion, your Honor did not; with all due respect to your Honor, your Honor did not.

THE COURT: Look, we are talking as one lawyer to another. I'm not taking any personal offense at this. Of course not.

MR. TAIKEFF: And I think perhaps your Honor is correct in paying great professional respect to Judge Bauman, but not in connection with his sentence of Edmund Alan Rosner.

THE COURT: And my recollection is that I reduced the sentence.

MR. TAIKEFF: Your Honor, we did have a

dialogue between ourselves on that subject on September 3rd and I tried to impress upon your Honor that I didn't think that was an appropriate view because it was a sentencing ... de novo, and it is clear that on a sentence --

THE COURT: Yes. But it was less than what Judge Bauman imposed.

MR. TAIKEFF: Yes. But nevertheless, by your Honor's own statement at page 14 of the sentencing minutes, which are appended to the moving papers, your Honor said, "In spite of Mr. Dershowitz' insistence that I not consider it, I am considering Judge Bauman's sentence."

MR. GLEKEL: When viewed in context, I think it is clear from the sentencing minutes that all your Honor was considering was Judge Bauman's view that this was a serious crime, and obviously your Honor was not considering the unrelated matters which you had just said a few minutes earlier in the transcript you were not considering.

So all the reference to Judge Bauman really refers to is that Judge Bauman felt this was a serious crime, as he indicated in the original sentence, and you shared that belief.

THE COURT: But it would be useless for us to spend much time on this because Mr. Taikeff is not going to convince me at this stage, but he ought to have, and will

have, a chance to convince the learned gentlemen upstairs.

MR. TAIKEFF: Your Honor, I'll say nothing else further about thos motion except I would want to say to your Honor, concerning the general remark your Honor made, that much of the time that it has taken to bring this case to the stage at which it is at now is not a result of any dilatory practice on the part of the defense but is a result of --

THE COURT: Mr. Taikeff, don't let me leave the record as implying that the defendant is responsible for these delays. I thought that I made it clear before. I think the judiciary has a good share in the blame. I mean, decisions took a long time to be reached, et cetera.

No, I didn't mean to say it was the defendant who had done all of this. All I meant was that the general machinery for the administration of justice doesn't seem to me to have functioned effectively in this instance.

MR. TAIKEFF: I agree with you, your Honor. But I don't want to leave the record in a state that would suggest that as counsel to the defendant I'm suggesting that the judiciary is at fault. I think it is the perjury of Mr. Leuci which took a long time to uncover, which has caused this case to go on for perhaps two more years than it should have, not the judiciary and not defense counsel.

MR. GLEKEL: I would note that although you imposed sentence in August of 1974, it has taken Mr. Rosner and his counsel over two years to discover this alleged defect in your Honor's sentence.

THE COURT: I know. But Mr. Taikeff would tell me that it is a hard job to uncover perjury and that they did it as soon as they could and maybe they are fortunate that they did it as soon as they did. Maybe they might never have done it.

MR. TAIKEFF: We were hoping to uncover it in the midst of the trial, your Honor, but unfortunately we didn't have a chance to do that.

THE COURT: Anyway, I've left you with a free road to the Court of Appeals. I take it this is appealable, isn't it?

MR. TAIKEFF: I believe it will be, your Honor.

THE COURT: I say --

MR. TAIKEFF: We believe it is.

THE COURT: I would assume so.

All right, then. Mr. Clerk, the endorsed memorandum and order should be filed and docketed.

All right.

- - -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	
-v-	73 Cr. 782
EDMUND ROSNER,	
Defendant.	

DEFENDANT's SENTENCING MEMORANDUM

Defendant Edmund Rosner stands before this Court for sentencing, after conviction on charges of bribery, obstruction of justice and conspiracy. His original sentence, imposed by the Honorable Arnold Bauman, was vacated by the Court of Appeals. Several months ago, the United States Attorney submitted a sentencing memorandum to this Court. Defendant's instant memorandum is divided into two sections: the first section is a response to the Government's memorandum; the second section contains material respectfully submitted for this Court's consideration in determining the appropriate sentence. Defendant also respectfully requests an opportunity, through his attorney, to bring additional material, of a more personal nature, to the attention of this Honorable Court in his oral presentation.

I

The government in its most recent sentencing memorandum has again committed the very error that led the Court of Appeals to reverse the prior sentence. It has again presented the sentencing court with an "adversary memorandum" prepared by

the prosecutor, not a professional neutral"; the report, which "the Probation Department did not screen or verify" includes "hea-say, inferences and conclusions"[1/] and is -- in important respects -- false and misleading. Moreover, the government asks this Court to give weight to the conclusions expressed by Judge Bauman at the prior sentencing, despite the fact that those conclusions were based on a report and procedure which the Court of Appeals found "wanting".

In its adversary memorandum, the Government argues that defendant Rosner is guilty not only of attempting "to obtain information through bribery and obstruction of justice in the then pending subornation of perjury case against him", but also "with respect to at least four (4) other unrelated matters as well" (Government's sentencing memorandum at p.1, emphasis added). In support of this, the Government argues that the Court of Appeals "found" certain of these allegations to be true in its opinion. Id at p.6. That is simply not the case! What the Court of Appeals did -- and what courts always do when the sufficiency of the evidence is challenged on appeal -- is to "view the evidence in the light most favorable to the Government" for purposes of the appeal. That is precisely what the Court of Appeals did here and that is what it said it was doing. Slip

1/ Slip opinion of the Court of Appeals at 5384, 5385, 5388.

opinion at 5357. In other words, the evidentiary matters cited in the courts opinion were not "found" to be true by the Court of Appeals as the government says; they were matters that the jury could possibly have found from the evidence. For the government to convert such evidence into facts "found" by the Court of Appeals is a gross distortion. Indeed, under the instructions given at trial, the jury was told that it could convict the defendant of each of the counts that it did convict on without finding a single one of the facts referred to by the Government in its sentencing memorandum. As the Government well knows, all the jury had to find to convict Rosner was that he attempted "to obtain information through bribery and obstruction of justice in the then pending subornation of perjury case against him...." (Government's sentencing memorandum at 1, emphasis added). It did not have to find anything whatsoever in regard to the "unrelated" matters relied on by the Government in its sentencing memorandum. Accordingly, for purposes of deciding what Rosner was convicted of, it is hornbook law that this Court may consider only those acts that the jury had to find in order to convict under the instruction. Robinson v California, 370 U.S. 600 (1962).

It is respectfully submitted that it would be especially inappropriate for a sentencing judge who did not preside at this trial to consider Government evidence which the jury may well have rejected. The trial judge can, at least, make his own independent

appraisal of evidence offered at trial. A sentencing judge who did not preside at the trial has absolutely no basis upon which to decide whether such evidence is credible or not. Accordingly, defendant respectfully submits that this Court should not, in imposing sentence, consider the "four (4) unrelated matters" relied on by the Government in its sentencing memorandum.

The government also asks this Court to give weight to its claim that after trial Rosner attempted to "infiltrate the United States Attorney's office" by sending someone to speak to an Assistant United States Attorney while "wearing a recording device" (Government's sentencing memorandum at p.10). Defendant Rosner categorically denies the government's version of this event. There was, as Judge Bauman himself recognized, no attempt to "infiltrate" (as that word is ordinarily used) the United States Attorney's Office.[2/] At most, there was an attempt to preserve on tape statements made by an Assistant U.S. Attorney. For the government to label that infiltration and to condemn it, requires incredible arrogance, considering the fact that so much of its case against Rosner rested on the use of secret recordings. There is, of course, nothing wrong -- either legally or ethically-- with recording statements made by an Assistant United States Attorney. cf United States v White, 401 U.S. 745 (1971).

2/ "[T]hat is a different kind of infiltration than fixing somebody to get information which one isn't entitled to" A.649.

Petitioner respectfully submits that the Government's version of the taping incident, which defendant disputes in critical respects, should not be considered by this Honorable Court in the determination of an appropriate sentence.

II

In light of the fact that defendant Rosner was previously sentenced for this conviction, it is important to emphasize that this is not a motion for reduction of sentence. This is a de novo sentencing proceeding in which no weight whatever may properly be accorded to the sentence previously imposed in a proceeding that the Court of Appeals found "wanting".

Edmund Rosner stands before this Court on a fresh footing to receive sentence for the offenses of bribery and obstruction of justice. He is a private attorney, never before convicted of any crime. In determining the appropriate sentence to be meted out to Mr. Rosner, it is respectfully submitted that it is appropriate for this Court to take into consideration the sentencing precedents and statistics relevant to Mr. Rosner's case.

It is commonplace that sentences must be in accord with the spirit and purpose of the law. See Marvin E. Frankel, Criminal Sentences, New York, 1973; People v Gokey, 9 Ill. App.3d 675, 292 NE2d 734, 738 (1973). This Circuit has recently pinpointed the "spirit and purpose" of the general statutory

provisions of which Mr. Rosner stands convicted. In United States v Carson, 464 F2d 424, 433 (2nd Cir. 1972) the Court explained:

> The policy foundation [of the federal bribery statutes] is central to the administration of justice at all levels of representative democracy:
>
> > It is a major concern of organized society that the community have the benefit of objective evaluation and unbiased judgment on the part of those who participate in the making of official decisions. Therefore, society deals sternly with bribery which would substitute the will of an interested person for the judgment of a public official decision. The statute plainly proscribes such corrupt interference with the normal and proper functioning of government.
>
> United States v Heffler, 402 F2d 924, 926 (3rd Cir.1968), cert. denied, Cecchini v United States, 394 U.S. 946, quoting United States v Labovitz, 251 F2d 393, 394 (3rd Cir. 1958) [Emphasis added].

The Court in United States v Carson summed up the central thrust of the statutory scheme thus:

> It is the corruption of official positions through misuse of influence in governmental decision-making which the bribery statutes makes criminal. Id at 434. [Emphasis added]

Mr. Rosner's offense, though extremely serious, was not the core crime aimed at by the statutes. He did not "substitute the will of an interested person for the judgment of a public official as the controlling factor in [an] official decision"; he did not cause or influence any government officer to make an official decision on the basis of financial or other personal interest. Mr. Rosner gave money, not to affect the decision-making

process, but to obtain a document which, he believed, would contain information possibly vital to his own liberty and future livelihood as a lawyer. Indeed, Mr. Rosner caused no "corruption of official positions" by his actions. The government officers involved in this case all acted entirely properly, under officially sanctioned instructions and orders. Cf. United States v Archer, 2nd Cir. Slip Opinion, at 4812, 4814-15, July 12, 1973. Only Mr. Rosner -- who was not an official entrusted with government function but merely a private practitioner -- acted illegally, in a desperate and ill-conceived effort to save his own skin

In deciding upon Mr. Rosner's punishment, consideration must be given to sentences imposed for other, comparable convictions. Only thus can the "consistency [in sentencing judgments] demanded by equal justice" be achieved. Frankel, supra, at 7. When a sentence is imposed which is "more severe than the sanctions generally imposed" in similar cases, the reviewing court will scrutinize the matter. United States v Walker, 469 F2d 1377, 1380 (1st Cir. 1972). Thus, in a recent case in which the appropriate sentence for a bribery conviction was at issue, the Appellate Court of Illinois "examined the recent bribery cases presented to Illinois reviewing courts" to determine what would be a fair and just sentence. People v Gokey, supra, at 738. The Court reasoned that any sentence in excess of the range of sentences imposed in similar situations

would be too severe to be sustained.[3] We respectfully request this Court to follow the wise and humane procedure[4] employed by the Gokey court, and to set Mr. Rosner's punishment within the context provided by the range of sentences imposed in similar cases.

Our research of similar cases has revealed the following: In cases involving the core offense aimed at by the federal bribery statutes -- the actual corruption of a government official such that his official decision-making is controlled by financial interest -- the typical sentence meted out has been two years or less. Indeed, most notably, when judges and prosecuting attorneys -- the officials entrusted with the greatest degree of governmental responsibility, particularly as it relates to the administration of justice -- have been

3/ The sentences reviewed by the Gokey Court are of relevance here: a policeman convicted of bribery received two year probation; a policeman convicted of bribery and official misconduct received five year probation, the first six months to be served in a jail-type setting under a work release program; a policeman convicted of bribery and official misconduct given two years probation and fined $200; a defendant with a prior record of four felony convictions, convicted of bribery, received a three year sentence plus $1000 fine, reduced to one year plus same fine. Id. The result in Gokey was to reduce the appellant's bribery sentence from a two-to-five year term to a one-to-three, to run concurrently with a one year sentence for unlawful use of weapons.

4/ Judge Frankel has exhorted the participants in our criminal justice system to humanize criminal sentencing by eliminating "wanton and freakish" disparaties and by fostering a measure of consistency and uniformity. Frankel, supra, Chapter Nine.

convicted of bribery and/or obstruction of justice, or related offenses, the two year sentence has been the standard maximum repeatedly applied. For example, in the celebrated case in this Circuit, James Vincent Keogh, a Justice of the Supreme Court of New York for Kings County, received a two-year sentence for conspiracy to influence, obstruct or impede the due administration of justice. United States v Keogh 391 F2d 138, 139 (2nd Cir 1968); United States v Kahaner 317 F2d 459 (2d Cir. 1963), cert. denied 375 U.S. 835. Justice Keogh served eight months of his two-year sentence and was placed on probation for the remainder. United States v Keogh, supra. In a much earlier widely-publicized Second Circuit case, Senior Circuit Judge Martin T. Manton also received a two year sentence (plus a $10,000 fine) upon his conviction for conspiracy to obstruct the administration of justice and to defraud the United States. United States v. Manton, 107 F.2d 834, 836 (2d Cir. 1938); Charles R. Ashman, The Finest Judges Money Can Buy, Los Angeles, 1973, at 271. In 1970, a New Jersey state judge, Ralph De Vita, received a two year sentence for bribery and obstruction of justice. Ashman, supra. Two state judges in Oklahoma received similar sentences in 1965: Nelson S. Corn, convicted on income tax evasion, but acquitted on a bribery charge, received a sentence of 18 months; Earl Welch, convicted on both bribery and income tax evasion,

was sentenced to a total of three years. Apparently bribery alone warranted only 18 months. Id. Countless other judges have of course avoided prosecution altogether -- hence securing their unlimited liberty -- by resigning from office upon being charged with bribery and/or obstruction of justice, or related crimes. See Ashman, supra.

Sentencing judgments levied against government prosecuting attorneys generally conform to the same pattern. Thus in the recent Archer case, familiar to this Court, the Assistant District Attorney for Queens County, Norman Archer, was sentenced to three years for the use of, and for conspiracy to use, interstate facilities to commit bribery. In that case the government characterized Archer as being involved in pervasive "corruption within the New York criminal justice system". United States v Archer, supra at 4810. In the Kahaner and Keogh case mentioned above Elliot Kahaner, former Chief Assistant United States Attorney for the Eastern District of New York received two years for his conviction for conspiracy to influence, obstruct or impede justice. United States v Keogh supra; United States v Kahaner, supra. Another celebrated case Glasser v United States, 315 U.S. 60, 62 S.Ct. 457 (1941) involved two Assistant United States Attorneys for the Northern District of Illinois, Glasser and Kretske. Both were convicted of conspiracy to " 'defraud the United States of and concerning its governmental function to be honestly, faithfully and dutifully

represented in the courts of the United States' in such matters 'free from corruption, improper influence, dishonesty or fraud'", by means of soliciting and accepting bribes to refrain from prosecuting violators of the federal internal revenue laws relating to liquor. For their gross violation of duty and sabotage of the administration of justice, Glasser and Kretske were each sentenced to fourteen months confinement.

Other cases involving government officials generally reveal the same range of sentences. For instance, in United States v Carson 464 F2d 424, 426, n.1, (2nd Cir. 1972), an Administrative Assistant to United States Senator, Hiram Fong, was sentenced to 18 months (plus a $5,000 fine) for conspiracy to travel in interstate commerce in furtherance of bribery in connection with his official duties, and to a concurrent term of 18 months for perjury. In United States v Heffler 402 F2d 924 (3rd Cir. 1968), a government contracting officer received a two year sentence, with all but sixty days suspended, for the crime of solicitation of bribes by a public official. See also Wilson v United States 230 F2d 521 (4th Cir. 1956).

When merely private attorneys have been the subject of federal bribery and obstruction of justice convictions, the typical sentence has been significantly less than two years. Thus, in United States v Glasser, supra, a private attorney, Roth, was convicted along with Glasser and Kretske, the two

Assistant United States Attorneys, for the very same conspiracy to defraud the United States by means of soliciting and accepting bribes. Roth was fined $500 -- a marked contrast to the fourteen month confinement meted out to Glasser and Kretske. More recently, in this Circuit, a private attorney and C.P.A., David Bernard Barash, was convicted of multitudinous counts of bribery in relation to internal revenue agents, and was sentenced as follows:

> Barash was sentenced to concurrent terms of imprisonment for nine months and a fine of $1,000 on each of counts 21-26 and 28-32; to terms of imprisonment of five years execution suspended, with a fine of $2,500 on each of counts 8 and 10; and to terms of imprisonment of two years, execution suspended with probation of five years, and a fine of $2,500 on each of counts 18 and 20. The total fine was $21,000. United States v Barash, 412 F2d, 26, 28 (2nd Cir 1969) cert denied 90 S.Ct. 86 [Emphasis added].

The total amount of time of non-suspended prison sentence given to Attorney-C.P.A. Barash for his extensive involvement in bribery of government agents was nine months.

The extreme rarity with which a sentence of more than two years imprisonment is ever imposed for a federal bribery conviction is highlighted by the composite statistics on sentencing published in the Annual Reports of the Director of the Administrative Office of the United States Courts. Analysis of these statistics for the two most recent years, 1972 and 1973

(reproduced on page 13a) reveals the following: Fifty-seven per cent of the total number of persons sentenced for bribery convictions in 1972 (58 out of 101), and 59 1/2 per cent in 1973 (78 out of 131) received no prison terms whatsoever. Moreover, only 13 per cent in 1972 (13 out of 101) and 17 1/2 per cent in 1973 (23 out of 131) received sentences which involved exposure to more than a maximum of one year and one day of confinement. Only four per cent in 1972 (4 out of 101) and nine per cent in 1973 (12 out of 131) received sentences involving exposure to as much as three years confinement. That means that fully 87 per cent in 1972 and 82 1/2 per cent in 1973 were punished by sentences which ranged from absolutely no loss of liberty to a loss with a maximum ceiling of one year and one day; and -- startlingly -- 96 per cent of bribery sentences in 1972 and 91 per cent in 1973 involved exposure to confinement of less than three years maximum.[5/] Indeed, the group of bribery convicts who were exposed to a six months ceiling on incarceration was as large as 75 per cent in 1972 (75 out of 101) and 76 per cent in 1973.

5/ An example of a 1973 case in which the defendant convicted under the federal bribery statutes received a sentence longer than three years was United States v Kahn 472 F2d 272 (2d Cir. 1973). That case, however, involved precisely the type of activity which maximally threatens the public interest: the court found that a government official was actually corrupted and influenced in his decision-making by financial interest. As indicated in the text of this brief, supra, Mr. Rosner neither influenced a government official in any decision-making activity nor did financial interest play any part in his illegal actions.

SENTENCES FOR BRIBERY CONVICTIONS IN 90 UNITED STATES DISTRICT COURTS

YEAR (fiscal period ended June 30)	Total Defendants Sentenced	IMPRISONMENT (a)						Probation	Fine Only	Other	Average Sentence of Imprisonment (c)
		Total	Split Sentence (b)	1 Year and 1 Day and Under	Over 1 Year and 1 Day to 3 Years	3 to 5 Years	5 Years and Over				
1972 (d)	101	43	17	13	9	3	1	42	14	2	15.1
1973 (e)	131	53	21	9	11	4	8	64	12	2	24.7

a) Includes sentences of more than 6 months which are to be followed by a term of probation (mixed sentences).

b) A split sentence is a sentence on a 1-count indictment of 6 months or less in a jail-type institution, followed by a term of probation, 18, U.S.C. 3651. Included in these figures are mixed sentences involving confinement for 6 months or less on 1 count, to be followed by a term of probation on 1 or more other counts.

c) Average sentence is not shown where the number of defendants sentenced to imprisonment was less than 25.

d) Annual Report of the Director, Administrative Office of the United States Courts, 1972, at 386.

e) Annual Report of the Director, Administrative Office of the United States Courts, 1973 at A-51.

In the face of these sentencing precedents and statistics, defendant respectfully submits that there can be no justification for sentencing Mr. Rosner to confinement in excess of that given the vast majority of offenders. Approximately three fifths of all federal bribery sentence judgments in 1972-1973 involve sentences of no loss of liberty whatsoever; more than three-quarters involve sentences of six months imprisonment or less;* over four-fifths involve sentences of one year-one day or less;* and well over nine-tenths involve sentences of three years or less*. The two-year term of incarceration has been reserved by the courts to punish only the most outrageous violations of the federal bribery-statutory scheme, those violations involving the core crime of corruption of the government decision-making process and involving the criminal participation of those endowed with government trust. Mr. Rosner's offense does not present such a case. Accordingly, under the principle that equal justice demands consistency in sentencing, defendant respectfully submits that Mr. Rosner's sentence should certainly be less than two years.

Respectfully submitted,

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* These figures include, of course, those defendants who received sentences involving no loss of liberty. All these figures are cumulative.

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